UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMERCIAL AIR, INC. *Charged Party* and **INDIANA STATE PIPE TRADES ASSOCIATION AND U.A. LOCAL 440, AFL-CIO** *Charging Party*	**Case No.:**	**25-CA-092821** **25-CA-099616** **25-CA-099620** **25-CA-099624** **25-CA-104026**

INDIANA STATE PIPE TRADES ASSOCIATION AND U.A. LOCAL 440, AFL-CIO'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

On August 29, 2014, the General Counsel and the Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO ("Petitioner" or "Union") filed their Exceptions to the Administrative Law Judge's Decision entered on August 1, 2014 ("ALJ Decision") asserting that the ALJ erred when he concluded that Respondent's terminations of Chris Lehr ("Lehr) and Charles Howard ("Howard") were not violations of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. The General Counsel and the Union further asserted that the ALJ erred when he determined that the record did not support the Charge that Respondent, through its President Tim Gatewood ("Gatewood"), threatened and coerced Lehr on August 17, 2012 in violation of Section 8(a)(1) by telling him that if he ever left the Respondent to go to the Union, he would never be re-hired. On September 12, 2014, the Respondent Commercial Air, Inc. filed its Response and Cross Exceptions.[1] The Petitioner herein submits its Reply to the Respondent's Response pursuant to Rule 102.46 of the National Labor Relations Board ("Board") Rules and Regulations.

In its Response, the Respondent asserts that ALJ Decision should be upheld because: 1) Substantial evidence supported the conclusion that Lehr was not threatened by Gatewood on August 17, 2012; 2) Gatewood's testimony alone established a downturn in plumbing work which caused Lehr's termination; and 3) Poor performance caused Howard's termination. Respondent's arguments in favor of upholding ALJ Decision are misguided and fail to take into account the overwhelming evidence introduced by the General Counsel and the Union at trial. A review of the evidence indicates that the decision of the ALJ should be overturned to hold the Respondent responsible for the threat made by Gatewood to Lehr in violation of Section 8(a)(1) of the Act, as well as for the unlawful terminations of Lehr and Howard in violation of Sections 8(a)(1), 8(a)(3),

[1] It should be noted that Section 102.46(j) specifically states that "any brief filed pursuant to Section 102.46 must not be combined with any other brief." Notwithstanding the language of Section 102.46(j), Respondent submitted a combined Response and Cross Exceptions Brief.

and 8(a)(4) of the Act. The Petitioner herein incorporates by reference its Statement of Facts from the Appeals and Exceptions brief filed with the Board on August 29, 2014.

II. ARGUMENT

1. The Threat Made By Gatewood to Lehr Violated Section 8(a)(1) of the Act

The threat made by Gatewood to Lehr in August 2012, was unquestionably a violation of Section 8(a)(1) of the Act. In its Response Brief, the Respondent argues the ALJ's Decision regarding the August 17th statement should be upheld because the General Counsel and the Union failed to introduce any written documentation (i.e. logs or NLRB Charges) that corroborated the threatening statement. *Respondent's Resp. 17-19.* In fact, the Respondent boldly asserted that the absence of written documents corroborating the statement 'eviscerates' the Union's argument that the threat was actually made in violation of the Act. *Respondent's Resp. 19.* It should be noted that the Respondent is essentially arguing against itself, as the Respondent all but acknowledges later in its brief that it produced no written documentation to support the alleged downturn in plumbing. *Respondent's Resp. 22-26.*

Notwithstanding these juxtaposing arguments, the Respondent clings to the lack of written documentation as conclusive proof that the threat was never made by Gatewood. *Respondent's Resp. 17-19.* However, the both the ALJ and the Respondent ignore the fact that the Lehr's testimony regarding the alleged threat was corroborated by several other witnesses. TR 113, 249. John Kurek ("Kurek") testified at the hearing that Lehr reported Gatewood's threat to him immediately after the threat was made. TR 113, 249. Moreover, Howard testified that a very similar statement was made to him during his interview. TR 158. Additionally, Lehr testified that Gatewood had previously made a very similar statement to him at the time of his interview. TR 109, 124.

Kurek's corroboration of Gatewood's threat, combined with Howard's testimony regarding a very similar threat made to him, strongly supports the conclusion that the comments were "a calculated attempt to discourage employee organization" in violation of Section 8(a)(1) of the Act. TR 109, 124, 159. *NLRB v. Dorothy Shamrock Coal Co*., 833 F.2d 1263, 1266 (7th Cir. 1987).

More importantly, the fact that Lehr reported the threat to Kurek immediately after the threat was made negated any necessity for Lehr to document the statement in his logbook. TR 113, 249. As Respondent cites in his Response Brief, "Mr. Kurek told [Lehr] to start a conversation with Mr. Gatewood about the Union and ***report back to Mr. Kurek***." TR 209-210 (emphasis added). This is exactly what Lehr did. The only reason Lehr was writing down information in the log book is so he could provide updates to Kurek at their weekly meetings. TR 111-113, 249. In this situation, Lehr called Kurek immediately following the threat and orally informed him of the statement made by Gatewood. As a result, the fact that the statement may not have been written in the logbook, or specifically set forth on the NLRB Charge, is immaterial.

In addition, the evidence introduced at trial clearly showed that Gatewood was hostile toward the Union.[2] Based on his documented anti-union sentiment, combined with the multiple accounts of similar statements made by Gatewood, there is no question that the record establishes that Gatewood threatened and coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent <u>for the Union</u>, he would never be re-hired.

Respondent cites to *Cobb Mech. Contractors, Inc.* for the proposition that even if such a threat was made by Gatewood, the threat would not be a violation of Section 8(a)(1) of the Act.

[1] As set forth in the Union's Exceptions Brief, in its Decision the ALJ stated that "the evidence show[ed] that the Respondent bore animus towards the Union." ALJD 14,16. The ALJ also stated that statements by Respondent's owner and president "demonstrated hostility towards, and mistrust of, the Union and union activity." ALJD 14,16. Additionally, the ALJ found that Gatewood's statements that he "oppose[d] unionization" and that "it would not be good for you" shed light on the Respondent's motivations regarding the alleged unlawful actions taken by Gatewood. ALJD 14.

2009 WL 5138341 (Div. of Judges Dec. 28, 2009). Respondent attempts to argue that the statement made in *Cobb* is analogous to the threat made by Gatewood. *Respondent's Resp. 21.* Respondent's interpretation of *Cobb* is misplaced. In *Cobb* the employer told several applicants that he usually did not hire union members because they "quit on me."

In the instant matter, the threat made by Gatewood was far different than the statement made in *Cobb.* For starters, the threat made by Gatewood referred specifically to Lehr with the intent of discouraging Lehr from working with the Union. ALJD 4; TR 113. Gatewood made very clear though his threat that if Lehr did go back to the union, he would never be considered for work again. TR 113. In contrast, the statement in *Cobb* was made generally to several applicants and was not intended to discourage any union activities. Instead the statement in *Cobb* was seen by the Board as simply informing the applicants as to why the employer generally stayed away from hiring union members. Such a statement surely would not have the same impact as a direct threat of losing future employment if Lehr went back to the union.

Based on his documented anti-union sentiment, combined with the multiple accounts of similar statements made by Gatewood, there is no question that the record establishes that Gatewood threatened and coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent <u>for the Union</u>, he would never be re-hired. As a result, the Union respectfully requests that this Board overturn the ALJ's opinion and find that the threat made to Lehr on August 17, 2012 by Gatewood violated Section 8(a)(1) of the Act.

2. <u>Chris Lehr was Terminated Solely Due to his Protected Union Activities.</u>

a. **Petitioners Unquestionably Met Their Prima Facie Burden by Showing that Respondent's Decision to Terminate Lehr was Motivated by Antiunion Animus.**

The ALJ correctly held that the evidence produced by the Petitioner demonstrated the Petitioner's *prima facie* case under *Wright Line* that the Respondent's decision to terminate Lehr

was motivated at least in part by antiunion hostility. ALJD 15. The ALJ arrived at this decision by considering the overwhelming evidence displaying the Respondent's feeling towards the Union. ALJD 13-14. For starters, the ALJ correctly held, and the Respondent does not dispute in its Response Brief, that the Respondent suspended Lehr in violation of 8(a)(3) of the Act a few days after Lehr was declared a volunteer Union organizer. ALJD 13-15. Additionally, following this suspension, on November 21, 2012, the Respondent delivered a memorandum to all employees informing them of the negative characteristics of the Union, specifically stating that the union would not be good for Respondent's employees.[3] ALJD 14. Furthermore, as the ALJ noted, Gatewood told Howard in his interview that if he ever left the Respondent ***for the Union***, he would never be re-employed. ALJD 3 (emphasis added). In addition, the Respondent made a similar threat to Lehr during his interview and again in August 2012. TR 249. Accordingly, based on the overwhelming evidence of union animus demonstrated by the Respondent there is very little question that the Petitioners met their initial *prima facie* burden under the *Wright Line* test.

b. **Respondent Produced No Evidence to Support a Downturn in Plumbing.**

In its Response Brief, the Respondent goes to great lengths to establish that the absence of written documentation is fatal to Petitioners' effort to meet their burden under Section 8(a)(1), 8(a)(3), or 8(a)(4) of the National Labor Relations Act. *Respondent's Resp. 18-19.* However, when addressing the Respondent's failure to produce written documentation to corroborate Respondent's downturn in plumbing, the Respondent takes a different tune. *Respondent's Resp. 22-23.* Instead, Respondent argues that the downturn in Commercial Air's business is undeniable, despite

[2] The ALJ found that Gatewood's statements in the Memo that he "oppose[d] unionization", that "it would not be good for you", and that "you can't rely on any promises made by a union", shed light on the Respondent's motivations regarding the alleged unlawful actions taken by Gatewood. ALJD 14.

Respondent's inability to cite to a single shred of documentation to support the downturn.[4] Additionally, the vast majority of the facts recited by the Respondent in its Response Brief to support the downturn in plumbing are not at all supported by the record.

For starters, the Respondent claims in its Response that Lehr admitted Gatewood told him in August 2012 that Commercial Air was having a hard time finding new plumbing jobs. However, Respondent cites to pages 122, 123 and 290 of the Transcript. On pages 122 and 123 of the Transcript Chris Lehr testifies only about his termination in March of 2013. TR 122-23. Any difficulty in finding plumbing jobs in August 2012 was never even discussed. TR 122-23. In contrast, on page 290 (as cited by Respondent) such issues were discussed, however, again it was *Gatewood* testifying as to difficulty in locating jobs. Respondent's statement that "Lehr admits Mr. Gatewood told him in August, 2012 that Commercial Air was having a hard time finding new plumbing jobs" is blatantly false.

Additionally, Respondent attempts to use the Employee Discharge/Layoff Checklist ("Discharge Checklist") as written documentation of the plumbing slowdown. *Respondent's Resp. 23-24.* Respondent even cites to General Counsel Exhibit 8, the Discharge Checklist for Tim Evans as evidence of the plumbing slowdown. *Respondent's Resp. 23-24.* However, General Counsel Exhibit 8 is anything but evidence of a plumbing slowdown, as Tim Evans was rehired by Respondent just days after Lehr was laid off for lack of work.[5] GC Ex. 10; TR 71; TR 82-83. As set forth in the Union's Exceptions Memo, Tim Evans continued to be employed full time by Respondent until August 2013 when he was terminated by Respondent for cause. GC Ex. 10. In

[3] The ALJ states in its Decision that the Respondent "did not introduce documentation of its downturn" nor did it introduce any "documentation showing that the total number of plumbing hours its employees were working had been consistently reduced." ALJ 16.

[4] Lehr was terminated on March 1. Payroll records for Tim Evans showed 39.30 hours for the week ending March 3, 2013. GC Ex. 10; GC EX. 25.

addition, Mr. Evan's hours remained steady during the weeks and months following Chris Lehr's termination. GC Ex. 10; GC EX. 25.[6]

Furthermore, the Discharge Checklists, which Respondent attempts to use to support the plumbing slowdown, are inconsistent with the Gatewood's testimony at trial. The Discharge Checklist for Charles Howard specifically stated that Howard was terminated due to a "Work slowdown / plumbing department labor reduction." GC Ex. 6. However, Gatewood testified at trial and Respondent argues throughout its Response Brief, that Howard was terminated for poor performance. ALJD 17-18. Respondent cannot have it both ways. As acknowledged by the ALJ, the Board has repeatedly held that when an employer offers inconsistent reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 2007; *GATX Logistics, Inc.* 323 NLRB 328, 335 (1997) enfd. 160 F.3d 353 (7th Cir. 1998).

Additionally, as pointed out by the ALJ, the Respondent did not introduce any documentation showing that the Respondent's revenue decreased due to a slowdown in work nor did it introduce any documents showing a reduction in actual plumbing projects. ALJD 16. The ALJ noted that Respondent failed to introduce any documentation showing a reduction in plumbing hours or documents supporting discussions about a layoff due to a reduction in plumbing work. ALJD 16. Simply put, testimony alone regarding a work slowdown, without any documentation to

[5] The Respondent argues in its Response Brief that there was nothing facially suspect about Respondent's actions in terminating Lehr and bringing Evans back just days later. This statement again is simply not true. For starters, the ALJ found that the General Counsel met its *prima facie* burden under *Wright Line* by showing that the actions of Respondent were motivated in part by discriminatory purposes. Additionally, the rehire of Evans, just a day or two after Lehr was terminated for lack of work, is strong evidence that Lehr's discharge was for discriminatory purposes. GC Ex. 10; TR 71; TR 82-83. The hiring of additional plumbers is clearly inconsistent with Gatewood's testimony of a downturn in plumbing business. GC Ex. 10; TR 71; TR 82-83. Additionally, as was evident from the hours worked by Evans after his "recall," Respondent had plenty of plumbing work at the time that Lehr was terminated. GC Ex. 10.

actually support the slowdown, is insufficient to rebut the *prima facie* case proved by the Petitioner. *Welcome-American Fertilizer Co*., 169 NLRB 862 (1968).[7]

The case of *International Union, United Auto, etc. v. NLRB*, presents facts which are eerily similar to the facts at issue here. 459 F.2d 1329 (D.C. Cir. 1972). In *International Union*, the Defendant fired employees who were actively involved in a union organizing campaign allegedly due to a cost-cutting program. *Id.* at 1333-34. At the hearing, the Defendant produced no documents to support the allegation that the Defendant engaged in a cost-cutting measure. *Id.* On appeal, the Court held that the ALJ and the Board failed to take into consideration the adverse inference rule when it decided in favor of the Defendant.[8] In reversing the Board, the D.C. Circuit specifically stated that the ALJ's opinion "totally ignore[d] the records in question and the company's failure to produce them" and instead simply relied on the Defendant's president's self-serving testimony. *Id.* at 1334. As a result, the Court held that the failure to produce evidence in support of the cost-cutting measure lead to an adverse inference that no cost-cutting measure took place.[9] *Id*. at 1343.

Similarly, in this case, the Respondent had the opportunity to introduce tax records, revenue records, balance sheets, hours reports, time sheets and other related records to corroborate the alleged downturn in plumbing work. Respondent failed to produce any such evidence. Instead, the

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[6] "Respondent's unexplained failure to support and substantiate its economic justification for the layoffs by the production of probative and material documentary records within the power of the Respondent to produce, renders the purported reason dubious and also warrants drawing an inference that if such records had been produced, they could not have been favorable to the Respondent. This failure to produce such evidence not only strengthens the probative force of its absence, but of itself is clothed with a certain probative force." *Welcome-American Fertilizer Co*., 169 NLRB 862, 870 (1968).

[7] The adverse inference rule has been used by the Labor Board on numerous occasions. *International Union*, 459 F.2d at 1336-37 (citing *Welcome-American Fertilizer Co*., 169 NLRB 862, 870 (1968); *Monahan Ford Corp*., 173 NLRB 204 (1969); *Mid States Sportswear, Inc*., 168 NLRB 559 (1967)).

[8] The adverse inference rule has been utilized on many occasions. In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) the Court held that "the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse"; and in *United States v. Roberson*, 233 F.2d 517, 519 (1956), the Court held "[u]nquestionably the failure to a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position."

only evidence produced by Respondent at trial was the self-serving testimony of Gatewood. As the ALJ noted, no documentation was produced to substantiate the downturn in plumbing. ALJD 16. The failure to provide documents which would clearly be within the Respondent's control creates a strong inference that no downturn in plumbing work actually occurred. The adverse inference that can be gleaned from Respondent's failure to produce a shred of documentation to support the downturn in plumbing, creates a very strong presumption that the Respondent did indeed terminate Lehr due to his Union activities in violation of Sections 8(a)(1), (3) and (4) of the Act.

3. <u>Charles Howard was Terminated Solely Due to his Protected Union Activities.</u>

Similar to the termination of Lehr, the Respondent failed to meet its *Wright Line* burden with regard to Howard's termination. First, it must be noted that when an employer offers inconsistent evidence on the motive for a termination "a reasonable inference may be drawn that the reasons being offered are pretext to mask an unlawful motive." *Inter-Disciplinary Advantage, Inc*., 349 NLRB 480, 506 (2007). The Respondent argues in its Response Brief that the Union's reliance on *Inter-Disciplinary Advantage, Inc*. is misplaced. However, the Respondent clearly misses the fact that Howard's Discharge Checlkist says he was terminated due to a lack of plumbing work, whereas Gatewood, testified that Howard was terminated because of his poor performance. TR 43. This type inconsistency in documents/testimony is exactly what the Board in *Inter-Disciplinary Advantage* held created a reasonable inference of discriminatory motives. *Inter-Disciplinary Advantage, Inc*., 349 NLRB at 506.

Not only is an inference of a pretext for the termination of Howard created by this inconsistent evidence, but the facts surrounding the termination of Howard provide a stronger case for the fact that Howard was terminated due to his Union activity. Only a few months prior to his termination, Howard was recognized for his work achievements by being invited on a trip with

other outstanding employees. TR 172. Moreover, at the Christmas Party in December, Gatewood gave Howard a monetary bonus and told him "I am glad I hired you." TR 173.

Considering Gatewood's acknowledgement about Howard's exceptional performance just months prior to his termination, the only reasonable explanation is that Howard was terminated for his Union activities. The inconsistencies in the paperwork filled out for Howard's termination, the lack of documents produced to support a downturn in plumbing work, and the inconsistent actions taken by Gatewood towards Howard's performance serves as a very strong basis for why this Board should overturn the ALJ's decision regarding the unlawful termination of Howard on the grounds that the Respondent failed to rebut the Union's *prima facie* case.

III. CONCLUSION

Based on the foregoing evidence and legal authority, the Union respectfully requests that its exceptions be granted and that the Board determine that Respondent's terminations of Lehr and Howard violated Section 8(a)(1) and (3) of the Act and the threat to Lehr violated Section 8(a)(1) of the Act and provide an appropriate remedy for Respondent's unlawful conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certified that on today's date, September 26, 2014 he served a copy of the Indiana State Pipe Trades Association and U.A. Local 440 AFL CIO's Reply Brief in Support of its Exceptions to the Administrative Law Judge's Decision **via electronic mail** to each of the below referenced the Recipients.

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